

TITLE 312 NATURAL RESOURCES COMMISSION

Emergency Rule LSA Document #08-117(E)

DIGEST

Temporarily adds rules to help implement P.L.231-2007 (which amends IC 14-25-2) with respect to water withdrawal contracts for water supply purposes from reservoirs that are financed by the state. Effective March 1, 2008.

SECTION 1. (a) This document assists with the application of P.L.231-2007 and IC 14-25-2.

(b) The document applies to contracts for the withdrawal or release of water supply storage from a reservoir, including provisions for:

- (1) The review of contract proposals.**
- (2) The administration of contracts.**
- (3) The expiration or other termination of contracts.**

(c) As used in this document, the following definitions apply:

- (1) "Advisory council" means the advisory council created by IC 14-9-6-1.**
- (2) "Commission" means the natural resources commission established by IC 14-10-1-1.**
- (3) "Department" means the department of natural resources created by IC 14-9-1-1.**
- (4) "Director" means the director of the department.**
- (5) "Division" means the department's division of water.**

(d) A person must not withdraw or obtain the release of water from a reservoir except as provided in:

- (1) the terms of a contract; or**
- (2) an exemption from a contract requirement under IC 14-25-2 and this document.**

SECTION 2. (a) This document governs the procedures for, and the substance of, consideration for any contract proposal approved by the commission after February 29, 2008, for the withdrawal or release of water from the water supply storage of a reservoir.

(b) A contract for the withdrawal or release of water supply storage from a reservoir, which was entered by the state before March 1, 2008, is governed by the terms of the contract and by any statute or rule in effect when the contract was entered.

This version of LSA #08-117(E), incorporates errata (corrections of errors). The original emergency rule, as filed with the Publisher, and posted to the Indiana REGISTER can be accessed at the following URL: <http://www.in.gov/legislative/iac/20080227-IR-312080117ERA.xml.pdf>.

(c) Upon the expiration or termination of a contract governed by subsection (a) or (b), any water withdrawal or taking of a release must cease unless a new contract is approved under IC 14-25-2 and this document.

SECTION 3. (a) The division shall serve as the point of contact and shall coordinate the administrative, professional, and technical functions of this document.

(b) Subject to IC 14-10-2-3, the division director shall issue any order appropriate to implementation of this document.

SECTION 4. (a) This SECTION provides definitions that apply to this document and that are in addition to those set forth in IC 14-8, IC 14-25-2, and 312 IAC 1.

(b) "Authorizing legislation" means the federal or state legislation which provides legal authority for the construction or maintenance of a reservoir. Examples are as follows:

(1) 44 U.S.C. 390b to 44 U.S.C. 390f.

(2) IC 14-26-4-12.

(3) With respect to a contract for water withdrawal or a release of water described in SECTION 2(a) of this document, any federal or state legislation cited in the contract.

(c) "Corps of Engineers" refers to the Army Corps of Engineers of the United States.

(d) "Division" refers to the division of water of the department unless another division of the department is specified.

(e) Except as otherwise provided in this subsection for specified reservoirs, "minimum quantities of stream flow" refers to an order, which implements the standards of IC 14-25-7-14, determined at a point of discharge of a reservoir's outlet works. With respect to the following reservoirs, "minimum quantities of stream flow" refers to the following:

(1) For Brookville Lake, forty (40) cubic feet per second above elevation seven hundred thirteen (713) feet, National Geodetic Vertical Datum of 1929 (NGVD-29). When lower than this elevation, the minimum quantities of stream flow are as determined by the Corps of Engineers.

(2) For Hardy Lake, five-tenths (0.5) cubic feet per second.

(3) For Lake Monroe, fifty (50) cubic feet per second whenever the reservoir pool is above elevation five hundred fifteen (515) feet, National Geodetic Vertical Datum of 1929 (NGVD-29). When lower than this elevation, the minimum quantities of stream flow are as determined by the Corps of Engineers.

(4) For Patoka Lake, five (5) cubic feet per second whenever the reservoir pool is above elevation five hundred six (506) feet, National Geodetic Vertical Datum of

This version of LSA #08-117(E), incorporates errata (corrections of errors). The original emergency rule, as filed with the Publisher, and posted to the Indiana REGISTER can be accessed at the following URL: <http://www.in.gov/legislative/iac/20080227-IR-312080117ERA.xml.pdf>.

1929 (NGVD-29). When lower than this elevation, the minimum quantities of stream flow are as determined by the Corps of Engineers.

(f) "Reservoir" means an impoundment that contains water supply storage and which was financed, or parts of which were financed, by the state.

(g) "Withdrawal or release of water" means:

- (1) the physical removal of water from or beneath a reservoir; or**
- (2) the outflow of water from a reservoir to maintain stream flow.**

SECTION 5. (a) A person that seeks to contract with the commission, for the provision of certain minimum quantities of stream flow or the sale of water on a unit pricing basis under IC 14-25-2-2, must submit a written request to the division under this document.

(b) A written request under subsection (a) must be completed and must include the following information:

- (1) The name, address, e-mail address, and telephone number of the following:**
 - (A) The person that would enter the contract.**
 - (B) At least one (1) individual who serves as a point of contact for the person that would enter the contract.**
- (2) If another person is acting for the person described in subdivision (1), the same information for the attorney or consultant as is described in subdivision (1).**
- (3) The location where any withdrawal or release from a reservoir would occur.**
- (4) The proposed use or uses of the withdrawal or release.**
- (5) The location of the proposed use or uses described in subdivision (4).**
- (6) The proposed daily limit for the withdrawal or release of water (or pump capacity, if the limit is proposed to be based upon a pump capacity).**
- (7) The proposed term, in years, of the contract and a justification for the proposed term.**
- (8) The proposed method for measuring the withdrawal or release of water.**
- (9) A summary of alternative water supply sources that were considered.**
- (10) A justification for why the reservoir is the most economic or feasible supply source.**
- (11) A conservation plan.**

(c) A written request under subsection (a) is not complete until the person submits, as part of the application, a contingency plan that describes the alternatives the person will use if the withdrawal or release of water from the reservoir is restricted due to a drought alert described in SECTION 13 of this document. A contract shall not be executed unless:

- (1) the contingency plan is feasible; or**
- (2) the person seeking the contract agrees to withstand the results of not being able to receive water from the reservoir.**

SECTION 6. The division shall provide notice as follows:

This version of LSA #08-117(E), incorporates errata (corrections of errors). The original emergency rule, as filed with the Publisher, and posted to the Indiana REGISTER can be accessed at the following URL: <http://www.in.gov/legislative/iac/20080227-IR-312080117ERA.xml.pdf>.

- (1) Not later than thirty (30) days after receiving request under SECTION 5 of this document, provide notice by certified mail to the persons described in IC 14-25-2-2.5(c).**
- (2) As soon as practicable, cause notice by publication in each county described in IC 14-25-2-2.5(f).**

SECTION 7. (a) The division director shall appoint a department employee to serve as hearing officer for any public meeting under IC 14-25-2-2.5(h).

- (b) The public meeting shall include the following:**
 - (1) A presentation by the department describing the:**
 - (A) nature of the pending request; and**
 - (B) process by which the commission will determine whether to enter into a contract with the person making the request. The process shall reference IC 14-25-2 and this document.**
 - (2) An opportunity for public comment on the pending request.**

(c) A hearing officer shall conduct the public meeting in a manner that is best suited to the solicitation of public comments in support of fact finding. Neither the rules of evidence nor IC 4-21.5 apply.

(d) A hearing officer shall maintain a record of the public meeting to assist in providing written recommendations to the advisory council. Any other person may also cause a recording to be made of the public meeting, but the official record is maintained by the hearing officer.

SECTION 8. (a) As soon as practicable following the public meeting, the hearing officer shall deliver a written summary of the meeting and any recommendations to the advisory council.

(b) The written summary required under subsection (a) shall, in anticipation of the memorandum required under IC 14-25-2-2(c), also consider the effect that the contract might have on recreational facilities.

(c) The advisory council shall consider the hearing officer's written summary and recommendations during a public meeting held under IC 5-14-1.5.

- (d) The advisory council is not limited to the written summary and recommendations of the hearing officer, but may also consider:**
 - (1) Recommendations of the division of state parks and reservoirs or another division of the department that manages the reservoir from which the water would be withdrawn or released.**
 - (2) Recommendations from a federal, state, or local agency with expertise regarding water usage and supply.**
 - (3) Information received before or during an advisory council meeting.**

This version of LSA #08-117(E), incorporates errata (corrections of errors). The original emergency rule, as filed with the Publisher, and posted to the Indiana REGISTER can be accessed at the following URL: <http://www.in.gov/legislative/iac/20080227-IR-312080117ERA.xml.pdf>.

(e) Not later than thirty (30) days after the final public meeting under SECTION 7 of this document, the advisory council shall submit to the commission a report summarizing the public meeting or meetings. The report may be accompanied by recommendations which duplicate, augment, or contrast with those of the hearing officer.

SECTION 9. (a) During a public meeting under IC 5-14-1.5, the commission may deliberate as to whether to approve a person's written request for the provision of certain minimum quantities of stream flow or for the sale of water on a unit pricing basis.

(b) The commission shall include in its deliberations a consideration of the following:

- (1) The standards provided by IC 14-25-2 and this document.**
- (2) The report of the advisory council under SECTION 8(e) of this document.**
- (3) Other statements or documents the commission elects to receive before or during the meeting.**

(c) Consistent with subsection (b), the commission shall determine to approve, condition, or deny a person's request and may elect to execute a contract under IC 14-25-2-2(a)(1). If the commission elects to execute a contract, the contract shall be delivered to the division. A determination under this subsection is governed by IC 4-21.5-2-5(11).

(d) Within twenty (20) days after receiving a contract delivered under subsection (c), the division shall submit the memorandum required under IC 14-25-2-2(c)(2) to the governor for the governor's consideration.

(e) A contract executed by the commission under subsection (c) is subject to approval by the:

- (1) Attorney general.**
- (2) Governor.**
- (3) Person desiring the use.**

SECTION 10. This SECTION establishes factors the commission shall consider in reviewing, and for acting upon, a person's written request for the provision of certain minimum quantities of stream flow or for the sale of water on a unit pricing basis:

- (1) Terms, conditions, and purposes of the authorizing legislation.**
- (2) The likelihood of adverse effects to public safety, the environment, or navigation.**
- (3) Availability of another source of water to the person making the request.**
- (4) Proximity to the reservoir of any person who would receive water from the person making the request.**
- (5) Water allocation priorities for use of the water:**

This version of LSA #08-117(E), incorporates errata (corrections of errors). The original emergency rule, as filed with the Publisher, and posted to the Indiana REGISTER can be accessed at the following URL: <http://www.in.gov/legislative/iac/20080227-IR-312080117ERA.xml.pdf>.

(A) First priority is for the use of domestic purposes as described in IC 14-25-1-3.

(B) Second priority is for the use of health and safety.

(C) Third priority is for power production that meets the contingency planning provisions of the drought alerts described in SECTION 13 of this document.

(D) Fourth priority is for industry and agriculture (not described in clause (A), clause (B), or clause (C)) that meets the contingency planning provisions of the drought alerts described in SECTION 13 of this document.

(E) Fifth priority is for a purpose described in clause (C) or clause (D) that does not meet the contingency planning provisions of the drought alerts described in SECTION 13 of this document.

(F) Sixth priority is for any other purpose.

(6) If the person making the request provides water to others (and the others provide for uses which include multiple priorities under subdivision (5)), the extent to which the person demonstrates an ability to implement the priorities for water allocation which are set by subdivision (5).

SECTION 11. (a) The commission shall not approve a contract which covers a period that is longer than authorized by a plan for water resource management approved under IC 14-25-7-11.

(b) In determining the duration of a contract, the commission may consider the water allocation factors in SECTION 10 of this document.

(c) Notwithstanding subsection (a) and subsection (b), a contract entered under IC 14-25-2 and this document must not cover a period of more than three (3) years.

SECTION 12. Unless exempted by SECTION 2(b) of this document, SECTIONS 13 and 14 of this document govern any contract for a water withdrawal or release from a reservoir which occurs during a drought alert or another emergency.

SECTION 13. (a) The director of the department may declare a drought alert for a designated reservoir based upon a drought emergency plan approved by the commission. A drought alert shall apply the Palmer Hydrologic Drought Index or exceedance values of regionalized monthly average stream flows.

(b) From least severe to most severe, a drought alert shall be declared as a drought watch, drought warning, or drought emergency.

(c) Contingency plans shall be specified for a drought alert in any of the following:

(1) A drought emergency plan approved by the commission.

(2) The terms of a particular drought alert.

(3) A contract for the withdrawal of water or the release of water from a reservoir.

(d) The stages of a drought alert and their associated criteria are as follows:

(1) A declaration of a drought watch is appropriate when either:

This version of LSA #08-117(E), incorporates errata (corrections of errors). The original emergency rule, as filed with the Publisher, and posted to the Indiana REGISTER can be accessed at the following URL: <http://www.in.gov/legislative/iac/20080227-IR-312080117ERA.xml.pdf>.

- (A) the Palmer Hydrologic Drought Index is -2.00 to -2.99; or**
- (B) the percentage of time flow is equaled or exceeded 75% to 90%.**
- (2) A declaration of drought warning is appropriate when either:**
 - (A) the Palmer Hydrologic Drought Index is -3.00 to -3.99; or**
 - (B) the percentage of time flow is equaled or exceeded 90% to 95%.**
- (3) A declaration of drought emergency is appropriate when either:**
 - (A) the Palmer Hydrologic Drought Index is -4.00 or less; or**
 - (B) the percentage of time flow is equaled or exceeded more 95%.**

SECTION 14. (a) The department and the Corps of Engineers may take such emergency measures as they individually or jointly determine necessary in the operation of a reservoir, including lowering the elevation of the water below an elevation at which water may be withdrawn or released under a contract, to protect life or property.

(b) Notwithstanding subsection (a), the department and the Corps of Engineers may enter any agreement between them as to which governmental entity shall exercise the authority described in subsection (a).

(c) A contract entered under this document for the withdrawal or release of water from a reservoir is subordinate to an exercise of authority under this SECTION.

(d) No third person has a right of action against the department or the Corps of Engineers based upon an exercise of authority under this SECTION.

SECTION 15. (a) The secretary of the commission may suspend or revoke any contract for the withdrawal or release of water where the person obtaining the contract:

- (1) Breaches the contract.**
- (2) Violates IC 14-25-2 or this document.**
- (3) For any improvement constructed or caused by the person to be constructed with respect to the withdrawal or release of water or for the subsequent distribution of the water, fails to exercise due diligence to require another person using the improvement to conduct activities consistently with the contract, IC 14-25-2, and this document.**

(b) The remedy described in subsection (a) is in addition to any other remedy provided by law.